

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Request for Review by)	Docket Nos. 96-45 and 97-21
Unicom, Inc. of Decision of)	
Universal Service Administrator)	

To: The Commission

GCI'S OPPOSITION TO UNICOM'S PETITION FOR REVIEW

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SUMMARY

GCI Communication Corp. d/b/a General Communication, Inc. d/b/a GCI ("GCI") is a full-service telecommunications carrier that provides facilities-based interexchange service throughout Alaska. The petition Unicom, Inc. ("Unicom") has filed concerns a contract between GCI and the Yukon-Kuskokwim Health Corporation ("YKHC") for the provision of telecommunications services eligible for universal service funding under the Rural Health Care Program ("RHCP"). GCI competed for and, as the least-cost bidder, fairly won the contract to provide these services to YKHC. Unicom, on the other hand, never submitted a bid in response to YKHC's request for service during this procurement but nonetheless has tried to frustrate this contract and blame YKHC for Unicom's own failure to submit a bid.

Unicom claims that YKHC deprived it of critical information during the bidding process. The Universal Service Administrative Company ("USAC"), however, reviewed the evidence in the record and found Unicom's claim to be meritless. Based on the evidence in the record, USAC reasonably found that "YKHC sought bids from Unicom, AT&T, and GCI, and that it responded in a timely fashion to Unicom's questions with as much detail as YKHC thought necessary to open a dialogue and obtain the services it sought."¹ Furthermore, USAC reasonably and correctly concluded that YKHC fully complied with the federal bidding requirements set forth in the Commission's regulations. In short, Unicom has no one but itself to blame for its failure to submit a bid during this procurement. There are no compelling grounds to grant Unicom's petition for review on this issue.

Notwithstanding its failure to submit a bid, Unicom also claims that YKHC erred by failing to implement a Native American preference during the procurement. Although Unicom

¹ Letter from D. Scott Barash, Vice President and General Counsel of USAC, dated September 6, 2001 ("Letter Decision"). A copy of the Letter Decision is attached as Exh. A to Unicom's Petition.

lacks standing to complain about this procurement since it never even submitted a bid, GCI nonetheless urges the Commission to address Unicom's claim that YKHC was required to implement a Native American preference under the RHCP. Unfortunately, this issue remains very much a source of controversy in Alaska. To avoid competing fairly with GCI and other non-Native owned carriers under the RHCP, Unicom is actively trying to politically pressure YKHC and other Native-owned health care providers in Alaska to implement a Native American preference in their selection of a carrier under the RHCP.

Unless the Commission addresses the issue, other Native health care providers in Alaska may soon succumb to Unicom's pressure and begin implementing Native American preferences in the RHCP bidding process. Such unbridled authority to implement these preferences potentially could include Indian set-asides (which exclude non-Native Americans from bidding under certain circumstances),² price discounts and other myriad Native American preferences that discriminate against non-Native owned carriers like GCI and violate Section 54.603(b)(4) of the Commission's rules, which requires the health care provider to certify that it has chosen the most cost effective method to meet its telecommunication requirements. Non-performance based criteria, like Native American preferences, are inconsistent with the Commission's open competitive-bidding requirements and will unnecessarily increase the costs borne by the RHCP.

The Commission can end this controversy in Alaska now by clarifying whether such preferences are permissible under its regulations. For these reasons, GCI urges the Commission to affirm USAC's decision in all respects and further clarify that implementation of Native American preferences in the RHCP bidding process is not permitted under the Commission's rules.

² See, e.g., Exh. 8 at Sec. I.B.2 (YKHC's Internal Procurement Policy), attached to Unicom's Letter to Mr. Blackwell, dated December 14, 2000 ("Unicom Complaint"). YKHC's "Buy-Indian Set-Aside" provision would exclude Non-Natives from submitting a bid when there are two or more qualified Native-owned organizations that submit a bid.

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General Communication Corp. d/b/a General Communication, Inc. d/b/a GCI ("GCI"), by its attorneys, opposes the Petition For Review filed by Unicom, Inc. ("Unicom"). In its Petition, Unicom requests that the Commission review the decision of the Universal Service Administrative Company ("USAC"),³ which rejected Unicom's claim that it was denied a fair opportunity to submit a bid in response to Yukon-Kuskokwim Health Corporation's ("YKHC") request for services eligible for Universal Service funding under the Rural Health Care Program ("RHCP"). USAC reasonably and correctly found that the evidence in the record shows that YKHC fully complied with the competitive bidding requirements in Section 54.603 of the Commission's regulations, and that Unicom had a fair opportunity but failed to submit a bid.

Notwithstanding its failure to submit a bid, Unicom nonetheless argues that the procurement violated the Commission's rules because YKHC failed to implement the Native American preferences set forth in YKHC's internal procurement policy.⁴ Although this claim lacks a factual basis because no Native-owned carrier (including Unicom) even submitted a bid during this procurement, and therefore Unicom does not even have standing to complain about

³ See *supra* n.1.

⁴ See Exh. 8 at Sec. I.B.2, attached to Unicom Complaint.

the alleged error,⁵ GCI nonetheless urges the Commission to address the issue. This is a live and present controversy in Alaska that warrants the Commission's attention: Unicom is actively trying to politically pressure YKHC and other Native American health care providers in Alaska to implement Native American preferences under the RHCP. Unless the Commission addresses the issue now, rural health care providers, like YKHC, may soon begin implementing Native American preferences in their selection of carriers under the RHCP. Such preferences, however, are contrary to Section 54.604(b)(4) of the Commission's rules,⁶ which requires health care providers to certify that they have chosen the least cost method to meet their telecommunication requirements under the RHCP. Non-performance based criteria, like Native American preferences, are inconsistent with the Commission's open, competitive-bidding requirements.

For the reasons stated herein, GCI requests that the Commission deny Unicom's Petition and further clarify that rural health care providers are not authorized to implement Native American preferences under the RHCP.

BACKGROUND

YKHC is a private, non-profit corporation⁷ that delivers health care services to the people of Alaska's Yukon-Kuskokwim Delta, a vast region that lies 400 air miles west of Anchorage, the state's largest city. YKHC provides health care services to more than 20,000 people living in

⁵ Apart from the standing issue, USAC's Letter Decision also states that "Unicom admits that its complaint is untimely" in regard to Funding Year 2 and that, in any event, the Unicom claim is moot for that period because no funding was issued for that year. Letter Decision at 5. Unicom does not challenge these findings. GCI also agrees with these findings and incorporates by reference its arguments in support thereof, which are set forth in GCI's opposition below in the Letter from Martin M. Weinstein to Mel Blackwell dated January 25, 2001 ("GCI Letter").

⁶ 47 C.F.R. § 54.604(b)(4).

⁷ Unicom has argued that YKHC is more than a private non-profit corporation and in fact has some form of sovereignty status because its Board of Directors are Alaska Native corporations. In a letter from Lloyd Benton Miller and Gerard Waldron to Mr. Blackwell dated March 8, 2001, YKHC very strongly disagreed with Unicom's characterization of YKHC, stating very clearly "YKHC is not a sovereign entity by any stretch of the word." YKHC
(footnote continued on next page)

over 50 Eskimo and Indian villages located in an extremely remote and isolated area in western Alaska. There are no roads or telephone lines that connect these villages to the urban areas of Alaska. As a result, these villages rely on satellite communications to reach the outside world.

The RHCP offers YKHC an opportunity to procure much-needed connectivity service between its central facility located in Bethel, Alaska and its remote village clinics located throughout the Yukon-Kuskokwim delta. Thus, YKHC sought to procure service under the RHCP and did so in full compliance with the Commission's competitive bidding requirements in Section 54.603.⁸ YKHC first sought service under RHCP in Year 1. It posted its requests for services on the Rural Health Care Division's ("RHCD") website on July 14, 1998.⁹ Under the rules then in effect, YKHC posted one Form 465, in which it requested network connectivity between its main medical facility in Bethel, Alaska and its health clinics located in approximately 50 remote village sites surrounding Bethel. After waiting over 45 days without receiving a response to its posting, YKHC contacted GCI, Unicom, and AT&T Alascom to solicit quotes for the requested services.¹⁰ In its August 31, 1998 e-mail correspondence to the three carriers, YKHC included a full list of the clinics and its estimate of the connectivity services needed for each of the village clinics.¹¹ Clearly, at this time, YKHC sought a bid from all the relevant carriers, including Unicom, and provided each of them with information regarding the request for services.

footnote continued . . .

is a non-profit corporation organized under the laws of Alaska and is subject to suit like any other non-profit corporation in Alaska.

⁸ 47 C.F.R. § 54.603.

⁹ Exh. 1, attached to GCI Letter.

¹⁰ Exh. 2, attached to GCI Letter.

¹¹ *Id.*

For its part, GCI did not have facilities in any of the village sites necessary to meet YKHC's request for services and was not then in a position to submit a bid to YKHC. Unicom, on the other hand, contacted GCI to inquire about the use of GCI facilities to submit a bid to YKHC.¹² At that time, Unicom did not complain about the lack of information in YKHC's request for services.¹³ Moreover, at least in the summer of 1998, Unicom did not object to YKHC's use of the Commission's competitive bidding process to procure service under the RHCP.

To GCI's knowledge, Unicom ultimately did not submit a bid in response to YKHC's request for services in Year 1 of the RHCP. Additionally, to GCI's knowledge, neither did AT&T Alascom. In short, YKHC was unable to procure the services it requested in Year 1 of the RHCP.

On and around June 17, 1999 (Year 2 of the RHCP), YKHC again sought network connectivity with its village clinics and submitted via the Internet completed Form 465's to the RHCD.¹⁴ This time, though, the RHCD rules required YKHC to submit separate Form 465s for each of the 50 different YKHC village clinics. The RHCD posted YKHC's various Form 465's on its website at the end of July 1999.¹⁵ Indeed, YKHC took the extra step of informing Unicom

¹² Exh. 3, attached to GCI Letter.

¹³ *Id.* In its February 16, 2001 Letter to Mr. Blackwell, Unicom tries to avoid what occurred and what it knew in 1998 by arguing that it did not have the status of an eligible telecommunications carrier (ETC) and therefore ultimately did not submit a bid because the FCC rules required carriers to have ETC status. Letter from William K. Keane to Mel Blackwell, dated February 16, 2001 ("Unicom February 16 Letter") at 4 n.3. This argument, however, is inconsistent with the letter Unicom sent to GCI on August 5, 1998, in which Unicom stated to GCI that "it is a carrier certified to receive federal universal service support for services to rural health care providers in the locations listed below [and that it] intends to file a proposal to provide services to the Yukon Kuskokwim Health Corporation in those locations." See Exh. 3, attached to GCI Letter. Moreover, Unicom clearly was interested in submitting a bid to YKHC as evidenced by its correspondence with GCI about leasing facilities.

¹⁴ See Declaration of Rebecca Grandusky at ¶ 3, attached as Exh. 1 to Letter from Lloyd Benton Miller and Gerard J. Waldron to Mel Blackwell, dated January 26, 2001 ("YKHC January 26 Letter").

¹⁵ The forms were posted between July 16, 1999 and July 22, 1999.

of the posting as shown in the e-mail sent by Ms. Grandusky to Unicom's Senior V.P., Chuck Russell, on September 30, 1999 in which she informed Mr. Russell:

Chuck, the request for proposals is on the internet RHCC site. I have requested T1 service from each village back to Bethel. The FCC only has tariffs for 128K or T1, so I chose T1. I was told by the FCC that I needed to choose a long distance carrier first and then contact the LEC for billing. If you are qualified to provide the long distance service, I would be happy to entertain your bid.¹⁶

On October 5, 1999, Mr. Russell replied by e-mail to Ms. Grandusky, stating:

Rebecca, I guess I need some help. I've looked on the internet at the RHC site (rhc.universalservice.org) and reviewed the FCC Form 465. The Bethel 465 lists T-1 and the village 465's list fractional T-1. I can't find a request for proposal or any description of the services you would like the IXC to quote. Am I looking in the wrong place? Could you send me a description of the services you would like quoted? Thanks Chuck.¹⁷

Ms. Grandusky then replied:

You are looking at the correct site. I am requesting a T-1 or fractional t-1 depending on the site. The T-1 and factional T-1 will connect each site to Bethel WAN.¹⁸

From a business perspective, GCI determined that it could not provide a bid in response to YKHC's requests for network connectivity to all of the village clinics YKHC requested. GCI decided to prepare a bid based on deploying its own facilities in selected sites of importance to YKHC.¹⁹ On October 11, 1999, GCI submitted a bid for T-1 connectivity from seven village

¹⁶ Exh. 1, attached to Unicom Complaint.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ These are the village sites that are the subject of GCI's contract with YKHC. In its Petition, Unicom claims that GCI possessed unique knowledge of which sites were important to YKHC, which it claims demonstrates that the bidding process was unfair. AT&T Alascom, however, also submitted a bid on these same sites, which disproves Unicom's contention that GCI possessed unique information regarding sites of importance to YKHC. Furthermore, Unicom ultimately did not submit a bid for any of the sites although it could have submitted a bid on any subset it wanted. All of the sites, not just the seven GCI bid on, surely are important to YKHC.

sites to Bethel.²⁰ Because of the capital investment needed to provide service to these extremely remote locations, GCI submitted a 5-year contract in its bid. AT&T Alascom also submitted a bid to YKHC to provide service for the same subset of sites on which GCI bid.²¹

On December 8, 1999, YKHC chose GCI to provide the service because its bid was the lowest cost and also met the needs of YKHC.²² YKHC and GCI signed a 5-year contract for GCI to provide T-1 satellite service between Bethel and Anchorage, Aniak, Quinhagak, Tooksook Bay, Nunapitchuk, St. Mary's, Makoryuk and Hooper Bay (the "Contract").²³ On March 24, 2000, USAC issued its funding commitment letter for Program Year 2 approving funds for each of the sites covered by the Contract.²⁴ GCI did not receive funds in Year 2 of the RHCP because deployment of facilities was underway and no service was provided that year. GCI now is currently providing service under its Contract with YKHC and is waiting for USAC to issue a funding commitment letter for each of the sites under the Contract for Year 3.

²⁰ Exh. 3, attached to Unicom Complaint.

²¹ See Declaration of Rebecca Grandusky at ¶ 6, attached as Exh. 1 to YKHC January 26 Letter. Despite the submission of this bid, AT&T Alascom's Ms. Flowers belatedly expressed dissatisfaction with the lack of specificity in YKHC's request for services in an e-mail dated November 28, 2000 (almost a year and a half after YKHC first posted its request for services on the RHCD website) in response to and at the apparent behest of Unicom. See Exh. 5, attached to Unicom Complaint. Unicom has seized on this correspondence in an effort to bolster its contention that the bidding process was unfair. Notwithstanding Ms. Flowers' belated dissatisfaction, she plainly did not identify any FCC requirement that YKHC did not satisfy. Moreover, AT&T Alascom did not file a protest and has not otherwise taken a position in this matter, which undermines Ms. Flower's assertions.

²² Declaration of Ms. Rebecca Grandusky at ¶ 1, attached as Exh. 1 to YKHC January 26 Letter. In its Petition, Unicom states that YKHC can purchase the same services more cheaply simply by purchasing tariffed services from AT&T Alascom and UUI as the local exchange carrier. Unicom Petition at 4. First, this belated assertion, even if true, does not excuse Unicom's failure to submit a bid and does not prove any wrongdoing or impropriety by YKHC's selection of GCI as the low cost bidder. Second, Unicom's speculative assertions about how much more cheaply it could provide the service does not take into account recent amendments to the Contract that USAC approved, which has both lowered the cost of but improved the quality of service. See Exh. 1, attached hereto. GCI upgraded its entire broadband satellite delivery system in early 2000 and immediately sought to pass on the lower cost and improved service to customers like YKHC.

²³ Exh. 3, attached to Unicom Complaint.

²⁴ Exh. 5, attached to GCI Letter.

ARGUMENT

I. USAC REASONABLY AND CORRECTLY FOUND THAT YKHC FULLY COMPLIED WITH THE COMMISSION'S COMPETITIVE BIDDING REQUIREMENTS

Eligible rural health care providers, like YKHC, seeking to receive universal service support through the RHCP must comply with Section 54.603 of the Commission's regulations.²⁵ Section 54.603 requires eligible rural health care providers to "participate in a competitive bidding process pursuant to the requirements established in this subpart and any additional and applicable state, local, or other procurement requirements."²⁶ Specifically, Section 54.603 requires the rural health care provider to submit a completed FCC Form 465 to the RHCD.²⁷ The RHCD then posts the completed Form 465 on its website and the rural health care provider must wait at least 28 days from the date the Form 465 is posted before selecting a telecommunications carrier to provide the requested service.²⁸

As discussed above, YKHC fully complied with these requirements. YKHC submitted its completed Form 465s to the RHCD on or around June 17, 1999 funding year (Year 2 of the RHCP) and indicated that it required some type of T-1 service from YKHC's main facility in Bethel to its village clinics.²⁹ YKHC received a bid from GCI on October 10, 1999 and a bid from AT&T Alascom on October 20, 1999 but did not receive a bid from Unicom.³⁰ YKHC waited more than 28 days after the Form 465's were posted on the RHCD website, and in fact,

²⁵ 47 C.F.R. § 54.603(a).

²⁶ *Id.*

²⁷ 47 C.F.R. § 54.603(b)(1).

²⁸ *Id.*, § 54.603(b)(3).

²⁹ See Declaration of Rebecca Grandusky at ¶ 3, attached as Exh. 1 to YKHC Letter. The Forms requested either fractional T-1 or T-1 service.

³⁰ See *id.* at ¶ 6.

waited more than 28 days after bids were received, before signing a contract with GCI on December 8, 1999. YKHC selected GCI because its bid met the needs of YKHC and was the lowest cost bidder.³¹

In its Petition For Review, Unicom claims that YKHC violated the Commission's competitive bidding rules because YKHC allegedly deprived it of critical information that was made available to GCI. Unicom infers this based on the fact that GCI submitted a bid for a limited subset of 7 sites rather for all 50 sites, and that GCI's bid was for a 5-year term to provide full T-1 service to these sites.³²

Unicom's inferences and allegations about the disparity in information available to bidders are baseless, and moreover overlook the information it did have to submit a bid. YKHC did not request a 5-year term or otherwise advise GCI on how to prepare its bid.³³ GCI, on its own, chose to include this term in its bid because of the significant capital investment required to deploy facilities to provide the service. Likewise, GCI, on its own, chose to submit a bid for a subset of sites because it was not then in a position to deploy facilities in all 50 sites. GCI submitted a bid for T-1 service because the posted Form 465's stated that YKHC required either fractional or full T-1 service. When GCI prepared its bid, it did so based on terms that complied with YKHC's stated requirements and its own business needs to justify the significant capital investment for the project.³⁴ The manner in which GCI prepared its bid does not prove or in any

³¹ See *supra* n.22.

³² Unicom Petition at 7.

³³ See Declaration of Rebecca Grandusky at ¶ 4-5, attached as Exh. 1 to YKHC January 26 Letter.

³⁴ AT&T also submitted a bid for full T-1 service for the same subset of sites disproving Unicom's allegation that GCI possessed unique knowledge about which sites are important to YKHC.

corroborate Unicom's allegation that YKHC deprived it of critical information.³⁵ USAC reached the same conclusion.³⁶

Furthermore, Unicom's arguments overlook the information and knowledge it did have to submit a bid. YKHC had been trying to procure telecommunication service for its village clinics under the RHCP since Year 1 of the program. It contacted each of the relevant carriers (including Unicom) on August 31, 1998 and provided each with a list of the clinics and services requested.³⁷ Unicom understood YKHC's telecommunication needs then and even contacted GCI to solicit a quote on facilities to submit a bid to YKHC at that time.³⁸ In 1998, Unicom did not complain about the lack of information regarding YKHC's request for services or the procurement process YKHC was implementing. Additionally, YKHC invited Unicom to submit a bid in Year 2 of the program and directed it to the posting on RHCD's website.³⁹

Unicom's argument that YKHC should have but failed to prepare a more detailed Request For Proposal with additional information finds no support in the Commission's regulations. Under the FCC's posting requirements, YKHC was required to provide enough information "sufficient to enable the carrier to identify and contact the requester and to know

³⁵ Likewise, Unicom's reliance on the Commission's decision in *Request For Review of Decision of the Universal Administrator by MasterMind Internet Services, Inc.*, FCC 00-167, 2000 FCC Lexis 2698 (May 23, 2000) is misplaced. In *MasterMind*, the Schools and Library Division denied funding on all requests where MasterMind was the named service provider because its employee essentially conducted the bidding process on behalf of the applicant. In these circumstances, the Commission noted that the competitive bidding process is compromised when an applicant surrenders control over the bidding process. In the present case, GCI did not in any way control YKHC's procurement process.

³⁶ Letter Decision at 7 ("no program violation inheres in GCI's decision to respond to only eight, rather than all 49, of the Form 465s that YKHC posted, nor in the contract's five-year term.").

³⁷ See Exh. 2 attached to GCI Letter.

³⁸ See Exh. 3, attached to GCI Letter.

³⁹ See e-mail correspondence set forth in Exh. 1, attached to Unicom Complaint, which is also discussed above.

what services are being requested.”⁴⁰ The Commission has determined that the FCC Form 465 requires applicants “to describe the services they seek and to include information sufficient to enable service providers to identify potential customers.”⁴¹ This information “is adequate to serve the purposes underlying the website posting requirements by allowing [beneficiaries] to take advantage of the competitive marketplace.”⁴² As discussed above, YKHC provided exactly the type of information that the FCC’s posting rules require. It sought quotes for T-1 service to its health clinics but appropriately left it to the carriers to determine how or what they could provide. On this issue, USAC correctly concluded that:

FCC regulations do not require rural health care providers to provide an RFP or other specific document in addition to the information provided on FCC Form 465 and posted to the RHCD website. Nor do the FCC regulations require that health care providers establish a deadline for receiving proposals. In regard to the Funding Year 2 funding requests, RHCD reviewed the FCC Forms 466 and 468 at issue and determined that they satisfied the program’s competitive bidding requirements. In particular, RHCD determined that the posted Form 465s provided sufficient information about the locations where telecommunications service was sought, and what YKHC wanted to accomplish so that prospective bidders could contact YKHC to discuss their telecommunication needs and provide bids for services.⁴³

Unicom has provided no basis to disturb this finding.

At bottom, Unicom has no one but itself to blame for its failure to submit a bid to YKHC. The facts and evidence in the record amply support USAC’s decision rejecting Unicom’s claim that YKHC violated the Commission’s competitive bidding requirements. GCI did not have any

⁴⁰ *Federal-State Joint Board on Universal Service, Report and Order*, 12 FCC Rcd 8776, 9133-34 (1997) (“*USF First Report and Order*”) (case history omitted).

⁴¹ *Federal-State Joint Board on Universal Service, Fourth Order on Reconsideration*, 13 FCC Rcd 5318, 5412 (1997).

⁴² *Id.*

⁴³ Letter Decision at 7.

greater access to information from YKHC than Unicom. GCI simply had more initiative and desire to serve YKHC. GCI urges the Commission to deny Unicom's Petition on this issue.

II. THE COMMISSION'S REGULATIONS IMPLEMENTING THE RHCP DO NOT REQUIRE (NOR PERMIT) YKHC TO IMPLEMENT NATIVE AMERICAN PREFERENCES AMONG BIDDERS

Unicom's second claim is that USAC erred by failing to require YKHC to implement the Native American preference provisions in its internal procurement policy. At the outset, this claim lacks a factual basis because no Native American-owned carrier (including Unicom) submitted a bid.⁴⁴ Nonetheless, because a number of Alaska health care providers are considering instituting impermissible preferences to select providers other than the most cost-effective bidder, the Commission should, as a matter of program integrity, reaffirm that its rules require the most cost-effective bidder be selected.

A. The Commission's Rules Do Not Permit Rural Health Care Providers to Use Preferences To Award Contracts Other Than To the Most Cost-Effective Bidder

Unicom's assertion that YKHC was required to apply a Native American preference ignores a fundamental requirement in the FCC's rules — that the rural health care provider must choose “the most cost-effective method of providing the requested service or services.”⁴⁵ The FCC adopted this requirement and its requirement of competitive bidding in order to “ensure[] that universal service fund is used wisely and efficiently.”⁴⁶ It is a basic program integrity protection that prevents the universal fund — and telecommunication consumers — from being burdened by paying for service that is more expensive or more elaborate than necessary.

⁴⁴ See, e.g., *Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 55 (D.C. Cir. 1991) (discussing Indian preference requirements but dismissing claim on standing grounds because the plaintiff “failed to assert that any of its members actually applied for or otherwise sought to fill the vacant OCM positions”).

⁴⁵ 47 C.F.R. 54.603(b)(4). See *USF First Report and Order*, 12 FCC Rcd at 9134.

The FCC made very clear that the requirement to select the most cost-effective service provider leaves eligible health care providers with the latitude to consider not just price, but also factors such as service quality, prior experience, past performance, personnel qualifications, management capability and environmental objectives.⁴⁷ Nothing in the FCC's rules or the *Universal Service First Report and Order* gives any indication that the Commission intended for eligible rural health care providers to consider non-performance related criteria in determining the most cost-effective bidder.

Unicom tries to evade the plain language of Section 54.603(b)(4) by pointing to Section 54.603(a), which requires eligible rural health care providers to use a competitive bidding process and which has a clause that permits the eligible health care provider to apply "any additional and applicable state, local, or other procurement requirements" in addition to the requirements set forth in Section 54.603. The *Universal Service First Report and Order* makes clear, however, that this savings clause in Section 54.603(a) was intended only to ensure that state, local or other procurement requirements consistent with the requirements of Section 54.603(b) are not preempted.⁴⁸ Nothing in Section 54.603(a) prevents Section 54.603(b) from preempting *inconsistent* state, local or other procurement requirements.

Allowing Section 54.603(a) to permit the application of state, local or other procurement requirements to direct an award to providers other than the most cost-effective bidder would make a mockery of the FCC's program protection requirements. Under such an interpretation, for example, a local ordinance directing contracts to be awarded only to bidders prescreened by

footnote continued . . .

⁴⁶ *Id.* (quoting 141 Cong. Rec. S8417 (Sen. Snowe) June 15, 1995).

⁴⁷ *Id.* & n.1803.

⁴⁸ *Id.* at 9134.

the Mayor would have to be honored, so long as the bidder was the most cost-effective provider prescreened by the Mayor — thereby excluding all other providers. Such an interpretation would open the doors to rampant waste, fraud and abuse because the RHCP bears the entire cost of the difference between the rural rate and the comparable urban rate. Unicom's construction of the Commission's rules must, therefore, be rejected.

In addition, even if Unicom's construction of Section 54.603 were correct, the internal procurement policies of a private corporation, like YKHC, are not enforceable procurement requirements under Section 54.603(a). Unicom's interpretation of Section 54.603 would federalize the internal purchasing policies of a private corporation so that the Commission in effect would become a "Contract Board of Appeals." This extension of the rule is far beyond what the Commission intended. Absent a violation of the Commission's specific competitive bidding requirements in Section 54.603, Unicom's proper recourse is to seek relief in the Alaska courts if it has a complaint about the internal process used by a rural health care provider to procure services under the RHCP.⁴⁹

Finally, even if YKHC were required to use a Native American preference — which it is not — the only result under the FCC's rules governing the rural health care program is that YKHC cannot make the certification required by Section 54.603(b)(4), and therefore cannot have its selected carrier receive federal universal service support. YKHC can always select any provider it legally is allowed to select under federal and state laws, but if it does not comply with Section 54.603(b)(4), it must pay for those services with its own funds.

⁴⁹ Unicom has adequate remedies for general contract matters in the courts of Alaska. *Cf. Listeners' Guild, Inc. v. FCC*, 813 F.2d 465, 469 (D.C. Cir. 1987) (noting the "Commission's longstanding policy of refusing to adjudicate private contract law questions for which a forum exists in the state courts").

B. Unbridled Discretion To Implement Native American Preferences Would Raise Constitutional Issues Under *Adarand*

In addition to being unwise, Unicom's interpretation of Section 54.603 would raise substantial and serious constitutional issues under the U.S. Supreme Court's decision in *Adarand Constructors, Inc. v. Peña*.⁵⁰ In *Adarand*, the Court held that the strict scrutiny standard of review under the Equal Protection Clause should be applied to all federal programs in which race is a factor.⁵¹ Although the U.S. Supreme Court held in *Morton v. Mancari*⁵² that Native American hiring preferences at the Bureau of Indian Affairs need only be "reasonable," a number of courts have more recently questioned whether *Mancari* survives *Adarand*. Indeed, in *Williams v. Babbitt*,⁵³ the United States Court of Appeals for the Ninth Circuit held that a Native American preference raised "grave" constitutional concerns, and concluded that "*Mancari*'s days [may be] numbered."⁵⁴

The FCC need not determine whether *Mancari* remains good law or is supplanted by *Adarand* if it finds that Section 54.603(b)(4) precludes application of non-performance based criteria such as preferences in selecting a service provider under the RHCP. The FCC should construe its rules to avoid this difficult constitutional issue.

⁵⁰ 515 U.S. 200 (1995).

⁵¹ *Id.* at 227.

⁵² 417 U.S. 535 (1974).

⁵³ 115 F.3d 657 (9th Cir. 1997).

⁵⁴ *Id.* at 938 n.70. See also *American Federation of Government Employees v. U.S.*, 104 F. Supp.2d 58 (D.D.C. 2000) (finding that a federal statutory preference for Native American firms in awarding engineering contracts is "likely" subject to strict scrutiny); *Malabed v. North Slope Borough*, 42 F. Supp. 2d 927, 937 (D. Alaska 1999) (limiting *Mancari* to statutes that "affect uniquely Indian interests" and casting doubt on *Mancari*'s continued validity). But see *Narragansett Indian Tribe v. National Indian Gaming Comm'n*, 158 F.3d 1335 (D.C. Cir. 1998) (applying the rational basis test to Indian classifications).

C. Neither the ISDEAA Nor the Communications Act Mandate Native American Preferences Under the RHCP

Unicom erroneously argues that federal law required YKHC to implement a Native American preference when selecting a carrier under the RHCP. In the first instance, this argument is irrelevant because, if correct, the only result is that YKHC is required to award contracts in a manner that makes it ineligible for service supported by the federal rural health care support mechanism. In any event, no provision of federal law requires YKHC to use a Native American preference.

Unicom relies on Section 7(b) of the Indian Self-Determination and Education Assistance Act (“ISDEAA”), 25 U.S.C. § 450e(b), to argue that Native American preferences are required under the RHCP. That section establishes a limited exception (and an affirmative preference) only for certain procurements under (1) federal ISDEAA contracts; (2) contracts or grants pursuant to the Johnson-O’Malley Act (25 U.S.C. § 452); (3) contracts or grants “pursuant to . . . any other Act authorizing Federal contracts with or grants to Indian organizations;” or (4) contracts or grants “pursuant to . . . any other Act . . . for the benefit of Indians.”⁵⁵ Unicom argues that the fourth category applies because the universal service provisions of Section 254 of the Communications Act of 1934, as amended (the “Act”) are intended to benefit underserved populations including Native Americans.

This argument is flawed because the Act is not designed to specifically benefit Native Americans. Likewise, neither the Universal Service Fund nor the RHCP were created for the purpose of benefiting Native Americans. These provisions, and specifically the rural health care provider support mechanism, are meant to benefit all persons served by the rural health clinic,

⁵⁵ 25 U.S.C. § 450e(b).

regardless of whether those individuals are Native Americans. The RHCP is specifically required to provide support to telecommunication carriers that provide telecommunication services “which are necessary for the provision of health care services . . . to any public or nonprofit health care provider that serves persons who reside in rural areas in that State at rates that are reasonably comparable to rates charged for similar services in urban areas of that State.”⁵⁶ Though the RHCP may support Native Americans in some situations, the reach of the program is clearly far broader than a program designed “for the benefit of Indians.”

Notably, Unicom does not and cannot point to any language in either the Universal Service provisions of the Communications Act or in the Commission’s Universal Service regulations evidencing either a Congressional or regulatory intent to implement Native American hiring preferences in awarding Rural Health Care Provider funding.⁵⁷ Unicom refers instead to Commission efforts to “benefit all underserved populations, including rural Alaska Native villages,” however, such efforts are aimed at increasing deployment and subscribership in tribal and other underserved areas and are not designed to promote the success of Native American Corporations in bidding for private telecommunications service contracts.⁵⁸ Indeed, even a general purpose of benefiting Native Americans is not enough to sustain application of the Native American preference requirements in ISDEAA to another Act particularly where, as here, the regulations call for open, competitive bidding.⁵⁹

⁵⁶ 47 U.S.C. § 254(h)(1)(A) (emphasis added).

⁵⁷ *Compare Alaska Chapter, Associated General Contractors of America, Inc. v. Pierce*, 694 F.2d 1162 (9th Cir. 1982).

⁵⁸ *See generally Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, Twelfth Report and Order, Memorandum Opinion and Order*, CC Docket No. 96-45, 2000 COMMISSION Lexis 3482 (June 30, 2000).

⁵⁹ *See e.g. Johnson v. Central Valley School District No. 356*, 645 P.2d 1088 (S. Ct. WA 1982) (grant authorized under the Indian Education Act was not reached by Native American preference provision of ISDEAA (footnote continued on next page))

In this case, it is the Communications Act that must evidence an intent to benefit Native Americans in the context of hiring or employment for ISDEAA to apply.⁶⁰ No such intent is evidenced either in the Communications Act or in the Commission's regulations implementing the RHCP. In fact, "Indians" and "tribes" are nowhere even mentioned in the Act, including the rural health care provisions of Sections 254(h)(1)(A) and (h)(5)(B) (which speak generally, *inter alia*, of "not-for-profit hospitals," "rural health clinics," and "consortia of health care providers").

The ISDEAA does not reach funding provided under the RHCP. Thus, Unicom has no federal right to an "Indian preference" in the award of telecommunication contracts under the Act.

footnote continued . . .

despite the fact that the Indian Education Act was designed to benefit Indians because: (1) Act designed to benefit Indian children and not to give a hiring preference to Indian teachers; (2) neither the act nor the grant contained a provision requiring the use of Native American preferences in hiring teachers; and (3) a condition of the grant was the utilization of the best available talents and resources available).

⁶⁰ *Id.* at 1094 ("Nowhere in the act authorizing the grant did Congress express a finding that this service could be best rendered by persons of Indian heritage").

CONCLUSION

For the reasons stated above, GCI respectfully requests that the Commission affirm USAC's decision in all respects and further clarify and affirm that the implementation of Native American preferences in connection with the Rural Health Care Program is not permitted under the Commission's rules.

Respectfully submitted,

**GCI COMMUNICATION CORP. d/b/a
GENERAL COMMUNICATION INC., d/b/a GCI**

/s/ Martin M. Weinstein

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Its Counsel

Dated: November 19, 2001

EXHIBIT 1

EI414015332US

sent 2/14/01



February 12, 2001

Service Change Request

Bill England
Universal Service Administrative Company
Rural Health Care Division
P.O. Box 7016
Lawrence, KS 66044-7016

Dear Bill,

GCI Communication Corp. (GCI) is requesting a service change in regards to the service being provided to Yukon Kuskokwim Health Corporation (YKHC). At this time we are contracted to provide YKHC T-1 Satellite Service (1.544Mbps) under contract HC001, dated 12/1/99. We request a service change to a T-1 packet-based satellite delivery (PBSD) service. With the service change, YKHC will receive essentially the same functions, with certain improvements. We have fully explained the operational and cost factors of the proposed service change with YKHC and have their approval to proceed with the service change provided it does not negatively impact their Universal Service Fund support. The service change will reduce the price of the service, and thus the cost to both YKHC and USAC would be reduced.

In December 1999, GCI entered into a contract with the Yukon-Kuskokwim Health Corporation (YKHC) to provide T-1 satellite service between Bethel (the location of YKHC's regional hospital), Anchorage, and 7 of the 56 villages¹ serviced by YKHC. Almost immediately we realized we would need to upgrade our delivery technology to meet the bandwidth needs of the entire YKHC and additional Alaskan health corporations.

In early 2000, we decided to upgrade our entire broadband satellite delivery system from a dedicated bandwidth delivery basis to the PBSD service which allows GCI to deliver the same bandwidth on an on-demand basis. Our dedicated, point to point satellite modems are being replaced with LINKWAY™ 2100 Comsat modems made by Lockheed Martin Global Telecommunications. The LINKWAY™ Comsat modems support Asynchronous Transfer Mode (ATM), Frame Relay, Internet Protocol (IP), Integrated Services Digital Network (ISDN), and Signaling System 7 (SS7) offering greatly improved flexibility for changing customer needs².

The PBSD is a service that provides bandwidth to each site through active bandwidth pool management. Minimum bandwidth for the pool is determined by the aggregate of the average peak busy hours bandwidth for the total number of subscribers. Since we are a facilities based provider we can directly manage the available bandwidth pool to meet subscriber needs. YKHC will continue to receive service at T-1 speeds on demand.

¹ YKHC website http://www.ykhc.org/corp_info/service_area/service_area.htm

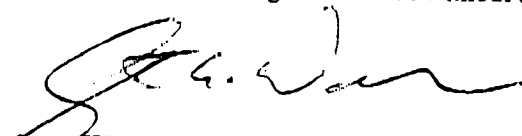
² SatNews OnLine Magazine™, Feb 2001, Comsat Introduces Satellite Networking Technology Specially Designed for the VSAT Market.

The new technology has the advantage of protocol flexibility, a fully meshed-single hop-delivery scheme negating the delays caused under the old system due to double hopping for correct address translation at a central facility and then delivery to the receiver.³ The PBSB service also allows for multicast video which is not directly supported by the dedicated, point to point satellite modems now being replaced by the LINKWAY™ modems.

PBSB has a cost savings for the same bandwidth assignments. The cost for delivery of a dedicated T-1 satellite circuit is \$13,320.00 per month⁴ and the cost for delivery of a PBSB digital data T-1 is \$11,515.00⁵. This price decrease will save cost for both YKHC and USAC.

In summary, there will be no increase in price, rather there will be a decrease in price for the equivalent level of service. The new PBSB service provides YKHC similar functions as the existing service, with certain improvements. There are no state or local bidding rules prohibiting this service change under the current contract, and the terms and conditions of this contract do not prohibit a service change. Both delivery methods—dedicated T-1 satellite and T-1 PBSB service are fully eligible under Rural Health Care Division rules.

GCI requests your prompt resolution of this request. Pending resolution, GCI is continuing to provide dedicated T-1s, at a higher cost and without the improvements mentioned above.



Steve Walker
GCI Broadband Services
USF Coordinator

³ "Double hops" required the signal to go from the originating ground to the satellite, down to a hub earth station, back to the satellite, and then down to the terminating location. This caused delay. With single hop delivery, the signal goes from the originating location, up to the satellite, down to the terminating location, without the "detour" to a hub.

⁴ F.C.C. No. 2, Sec 4.7.U.

⁵ F.C.C. No. 2, Sec 4.7.2.



Universal Service Administrative Company
Rural Health Care Division

September 13, 2001

Steve Walker
USF Coordinator
GCI Broadband Services
2550 Denali Street, Suite 1000
Anchorage, AK 99503-2781

Re: Change in Service Request Regarding Yukon-Kuskokwim Health Corporation

Dear Mr. Walker:

You have inquired if a change in service is permitted after a funding commitment has been issued under the Rural Health Care Universal Service Support Mechanism to several rural health care providers (HCPs). In particular, you have inquired about providing a change of service from T-1 satellite service (1.544Mbps) to a T-1 packet-based satellite delivery (PBSD) service to health care providers in the Maniilaq Association (Maniilaq) and the Yukon-Kuskokwim Health Corporation (YKHC).

As you have explained the service in your letters of February 12, 2001 (regarding YKHC) and March 13, 2001 (regarding Maniilaq), we understand that this change in service will:

- (1) Decrease service cost (which savings may simply reduce universal service support);
- (2) Provide the same bandwidth assignment, with improved performance due to the elimination of a "double hop" satellite link, with resultant signal delays and potential signal degradation;
- (3) Offer improved flexibility for changing customer needs in transmission protocols; and
- (4) Comply with the terms and conditions of the GCI/HCP service agreement, which does not prohibit such a service change.

We understand that GCI's interest in this change is that it allows GCI to deliver the same bandwidth on an "on-demand" basis, thereby allowing GCI's facilities to serve more customers through active bandwidth pool management. Although we realize this might reduce through-put for the customer at periods of unanticipated peak demand, the quality improvement tradeoff of eliminating the "double hop" appears to justify it and the overall service change is minor, thus preserving the HCP's Form 466 certification that they selected the most "cost-effective" service. Thus, we believe that these service changes comply with the FCC's decision in Los Angeles Unified School District (SLD-198056,

Mr. Steve Walker
September 13, 2001
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CC Docket Nos. 96-45 and 97-21, February 13, 2001), and these changes will not require the HCPs to repost their bids for selection of service providers (Form 465). However, if these changes lower rates on filed Forms 466/468, it will be necessary to refile those forms, so RHCD can recalculate support for these services.

Please note that notwithstanding your statement that there are no state or local bidding rules prohibiting this change under the service agreement, our holding that this change does not require reposting of Form 465s does not alter the requirement for the HCP to comply with any applicable state and local procurement law.

Sincerely,

RHCD/USAC
Rural Health Care Division
Universal Service Administrative Company

CERTIFICATE OF SERVICE

I, Colleen A. Mulholland, hereby certify that the foregoing GCI's Opposition to Unicom's Petition for Review was served this 19th day of November, 2001, by first class mail, unless otherwise indicated, addressed to:

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/s/ Colleen A. Mulholland

Colleen A. Mulholland